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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 826

EUGENE J. MORRISSETTE, FELIX LEE and NATHANIEL BROWN,

Petitioners,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To The Honorable The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on December 28, 1961, which judgment affirms the decision of the Trial Court in sustaining respondent's motion to dismiss the complaint for lack of jurisdiction, and which also denied petitioners' motion to transfer the cause to a state court.

OPINION BELOW.

The opinion of the Court of Appeals is set forth in the Appendix of this petition at pages 1a-3a and is not yet reported in the Federal Reporter.

GROUNDS FOR INVOKING THIS COURT'S JURISDICTION.

The opinion of the Court of Appeals was entered December 28, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1), and the Railway Labor Act, 45 U.S.C.A. 153 (L).

QUESTION PRESENTED FOR REVIEW.

Whether the failure to appoint a referee after a deadlock before the National Railroad Adjustment Board affords the railroad employee a right of action at law for wrongful discharge.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

There are no constitutional provisions involved.

The Federal Statute involved is: The Railway Labor Act, 45 USCA 153 (L). This is set forth on page 4 of this Petition.

STATEMENT OF THE CASE.

This action was brought to recover damages and to obtain reinstatement for the three plaintiffs who were wrongfully discharged from their railroad employment and lost their railroad seniority with defendant. The railroad moved to dismiss the complaint, the motion was sustained and plaintiffs' alternative motion to transfer the cause to a state court was denied.

The respective plaintiffs had been dining car employees and members of the Joint Council Dining Car Employees Union, Burlington Local 848, a labor union, for periods of 22, 10 and 4 years respectively, and they allege in their complaint that they had seniority rights. The complaint

further alleges that the railroad, in collusion with one Edward T. Bell, the general chairman of the union, maliciously and wrongfully caused each plaintiff to be expelled from the union for alleged delinquencies in dues, thereby permitting the railroad to discharge each of the plaintiffs. That subsequent to these wrongful and collusive discharges, the said Edward T. Bell was himself expelled from the union for a theft of its funds, and shortly thereafter the railroad hired Bell as their own employee, well knowing the details of his expulsion from the union for theft.

Plaintiffs further allege that after their discharge the railroad blacklisted plaintiffs both orally and by written communication to other companies and railroads and thus prevented them from obtaining other employment.

Each plaintiff submitted a claim to the National Railroad Adjustment Board, and on September 10, 1959, a deadlock resulted; no referee was appointed, but on December 16, 1959, while plaintiffs were awaiting a promised appointment of a referee, the Board denied the respective claims. Plaintiffs Morrissette and Lee pray judgment in the sum of $29,614.00 and plaintiff Brown prays judgment in the sum of $29,016.00.

Defendant filed a motion to dismiss the complaint for the reasons that the administrative processes of the Railway Labor Act had been exhausted, that the Court had no jurisdiction of either the wrongful discharge or the action for blacklisting; that the Court further had no jurisdiction to grant equitable relief for the reinstatement of an employee and further that defendant had a common law right to discharge an employee with or without cause.

REASONS FOR GRANTING THE WRIT.

I.

THE FAILURE TO APPOINT A REFEREE AFTER THE DEADLOCK BEFORE THE RAILROAD ADJUSTMENT BOARD GAVE PETITIONERS THE RIGHT TO PROCEED IN THE UNITED STATES DISTRICT COURT.

The opinion of the United States Court of Appeals reiterates the allegations of the Complaint that there was a deadlock and that instead of a referee being appointed to resolve the deadlock, the Division instead merely entered a formal order denying the respective claims of the petitioners.

The relevant portion of the Railway Labor Act is as follows:

> "Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division SHALL forthwith agree upon and select a neutral person, to be known as 'referee,' to sit with the division as a member thereof and make an award. *Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the mediation board, which board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award.* The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in

this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees." (Emphasis supplied.) 46 U.S.C.A. 153 (L).

The Supreme Court in the case of *Union Pacific* v. *Price*, 360 U.S. 601, traced the dissension arising from the fact that so many deadlocks arise before the Railroad Adjustment Board in their requirement that the Board be made up of five members representing management and five members representing labor. The Court states that this resulted in the 1934 amendment to the Railway Labor Act which contains the provision, set forth on page 612 of the opinion as follows:

> "Upon failure of a division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, the division MUST APPOINT A NEUTRAL REFEREE to sit with the division as a member thereof and make an award." (Emphasis supplied.)

In a matter before the Illinois Appellate Court in 1957 the Court gave its opinion that upon appeal to a Railway Adjustment Board consisting of five union and five carrier members, if there was a deadlock an eleventh neutral was to be appointed. *Payne* v. *Pullman Co.*, 13 Ill. App. (2) 105.

CONCLUSION.

For the reasons cited in this Petition, we respectfully pray that the Court grant its Writ of Certiorari.

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APPENDIX.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1961—SEPTEMBER SESSION, 1961

No. 13412

EUGENE J. MORRISSETTE, FELIX LEE and NATHANIEL BROWN,
Plaintiffs-Appellants,
v.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

December 28, 1961

Before HASTINGS, *Chief Judge*, and KNOCH and SWYGERT, *Circuit Judges.*

KNOCH, *Circuit Judge*. Plaintiffs, Eugene J. Morrissette, Felix Lee and Nathaniel Brown, brought action in the United States District Court to secure reinstatement as employees of defendant, Chicago, Burlington & Quincy Railroad Company, and to recover damages for wrongful discharge. The complaint alleges that jurisdiction in the District Court is founded on interpretation of the Railway Labor Act, 45 U.S.C., sections 151, *et seq.*

Plaintiffs have appealed from the District Court's order which sustained the motion of the defendant railroad to dismiss the complaint (for lack of jurisdiction in the Dis-

trict Court) and which also denied plaintiffs' motion to transfer the cause to a state court.

As the District Judge held, the Railway Labor Act does not give the District Courts jurisdiction of actions, based on wrongful discharge, which seek reinstatement or damages. *Buster* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Company*, 7 Cir., 1952, 195 F. 2d 73, 74 and cases therein cited.

The Railway Labor Act does provide an administrative remedy, and prior to bringing this action in the District Court, the plaintiffs did submit their claims to the National Railroad Adjustment Board, Third Division. Plaintiffs allege that on or about September 10, 1959, a deadlock resulted in the consideration of their claims by the Third Division. They cite the Act, 45 U.S.C. §153, which provides that upon failure of any Division to agree, because of deadlock, or inability to secure a majority vote, the Division shall select a neutral "referee." If the Division fails to do so within ten days, any member of the Division, or any party to the dispute may certify that fact to the Mediation Board, which within ten days shall select such "referee." The plaintiffs assert that while they were waiting for the promised appointment of a neutral referee (although no such promise is alleged in their complaint) the Division considering their claims did reach a decision, apparently resolving the deadlock, and eliminating any need for a neutral referee. Plaintiffs' claims were denied. The proceedings before the Division are not a part of the record before us, nor were they a part of the record in the District Court. The District Judge accordingly presumed the awards to have been validly determined. In any event, as the District Court opinion notes, it would have been improper to pass on the validity of the Board's award when the Board was not a party to this suit. *Ellerd* v. *Southern Pacific R. Co.*, 7 Cir., 1957, 241 F. 2d 541. Cf. No. 13270, *Arnold* v. *United Air Lines, Inc.*, 7 Cir., Nov. 6, 1961.

Plaintiffs could in the first instance have brought an action at common law in a state court where the applicable state law permits such action without a showing of prior exhaustion of administrative remedies. *Walters* v. *Chicago & North Western R. Co.*, 7 Cir., 1954, 216 F. 2d 332, 335-6. Plaintiffs, however, elected to submit their claims to the Board. This submission of their grievances, respecting their allegedly invalid discharges, precluded them from seeking damages in a later common law action. *Union Pacific R. Co.* v. *Price*, 1959, 360 U.S. 601, 617.

All other arguments advanced by the parties have been considered in reaching our conclusion that the decision of the Trial Judge must be affirmed.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois

Thursday, December 28, 1961

Before

Hon. John S. Hastings, Chief Judge

Hon. Win G. Knoch, Circuit Judge

Hon. Luther M. Swygert, Circuit Judge

EUGENE J. MORRISSETTE, FELIX LEE and NATHANIEL BROWN,
Plaintiffs-Appellants,
No. 13412 vs.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

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This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.